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CURRENT TOPICS.

Several of our contemporaries have recently been formulating definitions of legal journalism, and incidentally stating their positions upon the subject of criticism of judicial proceedings. Says the *Western Jurist*, with modest inconsistency:

"We are in receipt of many communications inquiring as to our silence concerning certain, in the opinion of correspondents, erroneous decisions of the Supreme Court of this State. Now, we desire to say here that we do not assume to act as superior to our Supreme Court, and do not feel called upon to assail its decisions whenever they see fit to differ with the opinion of the bar, or that of other courts. Occasionally, when that court rules contrary to its own previous decisions, or to the law as recognized by a majority of the courts, we feel at liberty to review their work and point out wherein we believe them to be in error. Courts are not infallible; they do not claim to be so; and it is showing no disrespect to them to call their attention to errors unintentionally committed; and when such instances occur we are glad to have our attention called to them if they have been overlooked by us. But these do not afford excuse for assailing the supreme tribunal of a State whenever its views happen to be at variance with our own. It is highly important that our courts have the respect and confidence of all parties; and it does not become any journal to lessen these by any utterances of its own."

The *Albany Law Journal* concurred in these views of our western neighbor, but the *Canadian Law Times* enters a protest, and thinks that about the only thing in the field of legal journalism worth doing, which can not be accomplished quite as well and better by other agencies, is just such careful and searching criticism and discussion:

"We must except from the province of journalism all manner of reporting. The publication of reports of cases adds value to a journal, but is not its primary object. News travels too rapidly to be sought for in monthly, fortnightly, or even weekly publications. Journalism proper, therefore, includes merely the discussion of the leading topics of the day, and the publication of essays and reviews. The respectful criticism of decided cases is perforce the foundation of all essay writing in our profession. And we can not conceive of a better opportunity for such criticism than the doubtful decision of a doubtful and debated point. Such respectful criticism will neither lower the tone of a journal nor lessen the respect due to the Bench. We do not feel it to be a duty to preserve silence whenever a decision of one of our courts appears to be doubtful or debatable. On the contrary, we believe such an event is the best opportunity that offers itself for opening up what may be a useful discussion upon the subject-matter of the decision."

We agree with our Canadian brother The bench is not a fetich, set up to be worshipped from afar, but a body of men chosen from a particular profession to accomplish certain ends in the administration of justice. Nor is the method upon which their investigations are pursued, shrouded in the impenetrable mystery of necromancy. If so, the *profanum vulgus*, ignorant of the successive steps by which the conclusions reached were attained, might with reason be required to refrain from discussing matters of which it knew nothing. But, on the contrary, these investigations form the principal part of the labors of the very profession in which the judges themselves received the training which qualified them for their positions. Any intelligent criticism of the reasoning and interpretation of authorities, which the opinions of the judges contain, not only must, in the nature of things, receive, but always has received, such attention and consideration from the gentlemen of the bar as it intrinsically merits; that is, it will be proportionately effective as it is backed by reasoning and the weight of authority. But to say that the gentlemen of the Bench are to be exempt from everything that savors of a critical disapproval, that their work is only to be reviewed "occasionally" to point out supposed error, simply because of their official position, and not because of the intrinsic excellence that inheres in it, for the sake of the maintenance of public respect and confidence in the court, seems to us absurd. That the courts should have the public respect and confidence, is a very good thing, so long as such respect and confidence have a substantial basis in the superior excellence of the work done by such courts; and as a matter of fact, we believe that both are freely accorded as a rule by the bar, and also the general public. But to say that the bench is to be fenced off from the adverse criticism of the members of that profession, which constitutes the only body in the community which is prepared by training and mental habit to form an adequate estimate of the value of its labors, is to shield it with a factitious respect and confidence which is a sham, and as such would be readily resented by any judge who had a spark of manliness in his composition.

EVIDENCE OF INSANITY AS A DEFENSE TO MURDER.

Assuming that in criminal cases, the burden is upon the defendant to prove his insanity, the question arises: What degree of evidence is required to establish the plea? There may be three answers to the question. It may be said, first, that the homicide must prove his insanity beyond a reasonable doubt; second, that he must show a preponderance of evidence in favor of his insanity; and third, that he must raise a reasonable doubt as to his sanity.

First, then, there must be proof beyond a reasonable doubt of the defendant's insanity. It is to be observed, that proof (by the State) beyond a reasonable doubt of the defendant's sanity is quite a different thing, and cases so holding are not to be cited as sustaining this rule; and also, that it is generally held, in effect, that the degree of proof required to establish insanity, an *alibi*, a plea of self-defense, or the prisoner's guilt, is the same; but *some* courts hold one degree for insanity, and another for the other defenses.

This first rule has never been followed by many courts, and probably no court would now follow it. It has been frequently stated that this is the law of England,[1] but probably it never was the law of England. The leading American case is State v. Spencer,[2] where Hornblower, C. J., said: "The proof of insanity at the time of committing the act, ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find a sane man guilty."

In Delaware the law is held to be that, if the proof necessary to establish insanity does not arise out of the evidence of the State, the defendant must prove his insanity to the satisfaction of the jury, beyond a reasonable doubt; otherwise, the presumption of sanity and soundness of mind will be unrebutted and in full force.[3]

Second, there must be a preponderance of testimony in favor of the plea. The principle of the rule is, *semble*, that *in medio tutissimus est.* It is probably proper to state this as being the law of England. In Regina v. M'Naughten,[4] a leading case, it is said by the judges that insanity must be proved "to the satisfaction of the jury—must be clearly proved." So, too, Mr. Baron Rolfe, in Reg. v. Layton,[5] citing M'Naughten's case, said that "The question is whether he (the defendant) has made out to the jury's satisfaction that he is not of sound mind." In Foster's Crown Law,[6] it is said, "all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner; * * * for the law presumeth the fact to have been founded in malice, until the contrary appeareth; and very right it is that the law should so presume. The defendant in this instance, standeth just upon the same ground that every other defendant doth; the matters tending to justify, excuse or alleviate, must appear in evidence before he can avail himself of them."[7]

In Reg. v. Higginson,[8] Tindall, C. J., says: "* * * * It must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of mind," etc.[9] It indeed, even seems that the third rule has been recognized in England.[10] State v. Redemeier[11] is a leading Missouri case. It is held that "if the preponderance of the evidence offered establishes insanity, it is sufficient." Judges Sherwood, Hough and Napton concur; and Judge Henry dissents.[12]

In Virginia, in Baccigalupo's Case,[13] Christian, J., in the opinion says that, "* * * the *onus probandi* is always upon the accused to prove such insanity to their satisfaction." And quotes with approbation from Boswell's

[1] Ex. gr., 1 Wharton's Cr. Law (8th ed.), sec. 60.
[2] 1 Zabr. 196.
[3] State v. Pratt, 1 Houston's Cr. Cas., 269; State v. Danby, Ib. 175; State v. Draper, Ib. 531; State v. Thomas, Ib. 511.
[4] 10 Cl. & Fin. 200; 1 C. & K. 130.
[5] 4 Cox C. C. 149.
[6] p. 255.
[7] And so it is laid down in 1 East Cr. Law, 224-340; Hawk. Pl., ch. 31, sec. 32; 4 Bl. Com. 201. Amby's Case (2 Str. 766, Ld. Raym. 1485), decided in 1727, is not in point. In that case the question of degree of evidence was not at all considered.
[8] 1 C. & K. 130.
[9] And see Reg. v. Stokes, 3 C. & K. 188.
[10] See *infra*.
[11] 71 Mo. 173.
[12] See *infra*. The following cases, among others, are affirmed by State v. Redemeier: State v. Klinger, 43 Mo. 127; State v. Hundley, 46 Id. 414; State v. Smith, 53 Id. 267; State v. Simms, 68 Id. 305.
[13] 33 Gratt. 807.

Case,[14] this instruction: "That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury." He also quotes from Prof. Wharton:[15] "I think the fair result of them all (the cases) is to show that insanity * * * * must be proved to the satisfaction of the jury to entitle the accused to be acquitted on that ground."

In Massachusetts,[16] Shaw, C. J., charged that a presumption of sanity must be rebutted by proof of the contrary satisfactory to the jury; and added that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane.[17] In Commonwealth v. York,[18] in point, though not involving the defense of insanity, a charge that the homicide being shown, all matter of excuse or extenuation was for the prisoner to prove by a preponderance of the evidence, and that in case of an equilibrium, the jury should acquit, was held unobjectionable. The rule seems to be different as to an *alibi* —a reasonable doubt acquitting the defendant.[19]

In Pennsylvania,[20] it is said, that "a serious and substantial doubt will work an acquittal." But in Ortwein v. Commonwealth,[21] it is held that the evidence must be satisfactory, not merely such as to raise a reasonable doubt.[22] In Meyers v. Commonwealth,[23] it is said by Agnew, C. J.: "That measure" (of the degree of proof) "is simply proof which is satisfactory—such as flows fairly from a preponderance of evidence." So, in Pannel v. Commonwealth:[24] "It may be established by satisfactory and fairly preponderating evidence." And again, in Sayers v. Commonwealth.[25]

But in a trial for murder, as to an *alibi*, the court say: "If from any, or from all the evidence taken together, a reasonable doubt of defendant's guilt is raised, there must be an acquittal."[26]

In California, People v. Wreden,[27] it is held, insanity, in order to constitute a defense to a criminal action, may be established by mere preponderance of evidence.[28]

In Alabama[29] it is held that a reasonable doubt of the prisoner's guilt must acquit. In State v. Modler,[30] "the jury must be fully satisfied that the defense is made out, beyond the reasonable doubt of a well-ordered mind;" and this is expressly affirmed in State v. Brinyea,[31] and again in State v. Newman.[32] But in Boswell v. State,[33] it is held that there must be a preponderance of evidence of insanity—supporting the dissenting opinion of Collier, J., in State v. Madler. And the court observe that the opinion in that case is inconsistent in its parts and can not be reconciled. Brinyea's case is also criticised. And in Brassell v. State,[34] this doctrine is again laid down.

In an Iowa case,[35] it was held that a reasonable doubt of the guilt of a party entitles him to an acquittal. But in State v. Felter,[36] an instruction was sustained which informed the jury that it was sufficient to justify an acquittal, that they were reasonably satisfied of the prisoner's insanity, upon a consideration of the whole testimony, and by a preponderance thereof. The court did not notice Tweedy's case, and some of the cases cited perhaps rather sustain the reasonable doubt rule. In a murder case it was said that the State has the burden of proof to show beyond a reasonable doubt the guilt of the accused.[37]

In Ohio,[38] the burden of proving that the

14 20 Gratt. 860.
15 1 Whart. Cr. Law, sec. 711.
16 Commonwealth v. Rogers, 7 Met. 500.
17 See, in affirmation, Commonwealth v. McKie, 1 Gray, 61; Commonwealth v. Eddy, 7 Id. 584; Commonwealth v. Heath, 11 Id. 303.
18 9 Met. 93.
19 Commonwealth v. Choate, 105 Mass. 452.
20 Commonwealth v. Harman, 4 Barr. 269.
21 26 P. F. Smith, 414.
22 This is followed by Lynch v. Commonwealth, 77 Pa. St. 205. Brown v. Commonwealth, 28 P. F. Smith, 128; Myers v. Commonwealth, 29 Id. 311.
23 2 Norris, 141.
24 86 Pa. St. 268.
25 88 Pa. St. 291.
26 Turner v. Commonwealth, 86 Pa. St. 74.
27 12 Reporter, 682 (1881).
28 This case affirms People v. Meyers, 20 Cal. 518; People v. Coffman, 24 Cal. 233; People v. McDonnell, 47 Cal. 134; People v. Wilson, 49 Cal. 14; People v. Bell, Id. 485.
29 Ogeltree v. State, 28 Ala. (N. S.) 693.
30 2 Id. 43.
31 5 Id. 244.
32 7 Id. 69.
33 63 Ala. 307.
34 64 Ala. 318 (1881).
35 Tweedy v. State, 5 Iowa, 433.
36 32 Iowa, 49.
37 State v. Morphey, 33 Ia. 270. And see State v. Porter, 34 Id. 131; State v. Bruce, 48 Id. 531.
38 Sievens v. State, 22 Ohio, 90.

homicide was excusable on the ground of self-defense, is held to rest on the defendant, and must be established by a preponderance of the evidence. And so as to insanity, in Loeffner v. State.[39] A "bare preponderance" will suffice.[40] And again, in Bergin v. State,[41] though the question did not clearly arise.[42] On questions of sanity, the rule as to reasonable doubt does not apply; but it is for him that alleges insanity to prove it as other material allegations are proved.[43]

In State v. Merrick,[44] a trial for larceny in Maine, it was held that a reasonable doubt of defendant's guilt will acquit. But the plea of insanity must be established by a preponderance of the evidence.

In Kentucky, in Smith v. Com.,[45] it was held that a reasonable doubt of defendant's sanity must acquit him. So, in Jane v. Commonwealth.[46] In a subsequent case, however, it was said that a mere doubt was not enough—the doubt must be truly reasonable.[47] The jury must be satisfied that the prisoner was insane, and not responsible for his acts.[48]

In South Carolina the plea must be proved to the jury's satisfaction.[49] And in Texas it must be clearly proved to the satifaction of the jury.[50]

In West Virginia it is not sufficient to raise a reasonable or rational doubt of defendant's sanity.[51] But in case of the plea of self-defense in a trial for murder, the raising of such doubt will acquit.[52]

Again, in Minnesota, insanity must be proved by a preponderance of the evidence.[53]

So, perhaps, in the Georgia case of Holsenboke v. State,[54] where the language is not very perspicuous; but the law of Georgia is so stated and settled in Carter v. State.[55]

In Arkansas,[56] it was held that the defendant must "produce evidence sufficient to change the presumption raised against him by proof of the killing." This, perhaps, means that a preponderance is necessary.

The law of New Jersey may, perhaps, be less rigorous than it was laid down in State v. Spencer;[57] and the rule now under discussion may prevail. See Judge Depue's charge in State v. Martin.[58]

Third, that it is only necessary that the evidence offered should be sufficient to raise a reasonable doubt as to the prisoner's sanity. Cases holding that there must be proof (by the sovereign) beyond a reasonable doubt, of the prisoner's sanity, are authorities for this rule.

In England it was provided by statute,[59] that if any persons indicted shall be found to be insane by a jury impanneled for that purpose, the court may order him, not to be tried, but to be kept in strict custody until his majesty's pleasure be known. In a case under this act, the jury were thus instructed: "If there be a doubt as to the prisoner's sanity, and the surgeon says it is doubtful, you can not say he is in a fit state to be put upon his trial."[60]

In his dissenting opinion Judge Henry, in State v. Redemeier,[61] strongly adheres to this as being the just and true rule. State v. Crawford,[62] is a strong and leading case fixing this as the rule of Kansas. And so the law was ably laid down by Bellows, J., in State v. Bartlett in New Hampshire.[63]

In Indiana,[64] it was held that a reason-

[39] 10 Ohio St. 598.
[40] Bond v. State, 23 Ohio St. 349.
[41] 31 Ohio St. 111.
[42] But see Judge Burchard's charge in Clark's Case 12 Ohio, 483, as supporting the third rule; and also, State v. Thompson, 2 Wright, 624.
[43] State v. Starling, 6 Jones' Law, 366; and see State v. Frank, 5 Id. 384; State v. Knox, Phillip's Law, 312.
[44] 19 Me. 398; and see State v. Lawrence, 57 Me. 574.
[45] 1 Duvall, 224.
[46] 2 Metc., (Ky.) 30.
[47] Kriel v. Commonwealth, 5 Bush. 362.
[48] Graham v. Commonwealth, 16 B. Mon. 587.
[49] State v. Stark, 1 Strobh. Law, 474.
[50] Webb v. State, 5 Tex. App. 596; Clark v. State, 8 Id. 350; Webb v. State, 9 Id. 490; King v. State, 9 Id. 515. In the two latter cases, Mr. Justice Hunt dissents in an able and elaborate opinion, following our third rule. And it may be added that as to guilt the rule of reasonable doubt prevails. Shultz v. State, 13 Tex. 401; Brown v. State, 23 Id. 195.
[51] State v. Strander, 11 W. Va. 823.
[52] State v. Abbott, 8 Id. 744.
[53] State v. Gut, 13 Minn. 341; and see Bonfanti's Case, 2 Id. 123.
[54] 45 Ga., 55.
[55] 56 Ga., 463.
[56] McKenzie v. State, 26 Ark., 334.
[57] *Supra*.
[58] 10 Wash. L. Rep. 33 (1881).
[59] 39 & 40 Geo. III., ch. 9, sec. 2.
[60] Ley's Case, 1 Lewin, C. C. 239.
[61] *Supra*.
[62] 11 Kan., 32.
[63] 43 N. H., 224.
[64] Hiler v. State, 4 Blackf., 552.

able doubt must acquit. So, in Polk v. State,[65] held (Hanna, J., *dissentiente*), that if the jury have a reasonable doubt whether the accused is sane, they must have a reasonable doubt whether he purposely and maliciously committed the act, and hence a reasonable doubt whether he committed the statutory crime, and therefore they must acquit.[66] The same is the law as to an *alibi* [67] And in the important case of Guetig v. State,[68] it is held that a reasonable doubt raised as to defendant's sanity must acquit.

In Illinois, in Hopps v. People,[69] it was held, qualifying the rule in Fisher's Case,[70] that a reasonable doubt of defendant's sanity acquits him. And so, again, in Chase v. People,[71] explaining Hopps v. People. So as to guilt.[72] Myatt v. Walker,[73] is not in conflict with Hopps v. People, unsoundness in that case being alleged as a ground for setting aside a deed; it was a civil case.

In Mississippi it was said; "The jury must believe that insanity exists; a reasonable ble doubt is not sufficient.[74] In Pollard v. State,[75] it was held that when, to a charge of murder, the defense is an *alibi*, if the evidence raises a reasonable doubt, the jury must acquit the prisoner. And the same rule is declared where the defense is insanity.[76]

In New York, in People v. McCann,[77] it was held that the prisoner is entitled to the benefit of any doubt resting upon the question of sanity. The Supreme Court had previously decided that the charge in this case, that the defense of insanity must be proved beyond a reasonable doubt, was correct. And in Brotherton v. People,[78] " * * * if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt; and to an acquittal." [79] In People v. O'Connell,[80] Danforth, J., of the New York Court of Appeals, in a decision handed down January 17, 1882, affirms Brotherton v. People,[81] and establishes the "reasonable doubt" rule in New York.[82]

In Tennessee this reasonable doubt rule prevails;[83] and in Michigan;[84] and in Vermont.[85] In Connecticut, in State v. Johnson,[86] a charge that the jury must be satisfied beyond a reasonable doubt before convicting a man of crime, that he is of sound mind—a sane man, was held correct.[87]

Chaffee v. United States,[88] may be noted under this rule. On the trial of Daniel E. Sickles for the murder of Philip Barton Key, in the district court at Washington, Judge Crawford ruled that the government must prove sanity beyond a reasonable doubt.[89] United States v. McClane,[90] though not involving the defense of insanity, is directly in point and sustains this rule: "If on all the evidence, the jury are left in reasonable doubt as to the intent of the defendant, they can not convict him of the crime." [91] In charging the jury in the Guiteau case, Jan-

65 19 Ind., 170.

66 So, it is held in Stevens v. State, 31 Ind. 491; Bradley v. State, Id. 492, explaining Arnold v. State, 23 Ind. 170.

67 Line v. State, 51 Ind. 175; Kaufman v. State, 49 Id. 248; Binns v. State, 46 Id. 311; Adams v. State, 42 Id. 373.

68 66 Ind., 94.

69 31 Ill., 385.

70 23 Ill., 283.

71 40 Ill., 352.

72 Pate v. State, 3 Gilm. 644; Alexander v. People, 96 Ill. 143.

73 44 Ill., 487.

74 State v. Huting, 21 Miss. 477.

75 53 Miss., 410.

76 Cunningham v. State, 56 Miss. 269, taking no notice of State v. Huting.

77 16 N. Y., 58.

78 75 N. Y., 159.

79 This overrules, perhaps, People v. Schayner, 42 N. Y. 1, and Flanagan v. People, 52 N. Y. 467, the latter adopting the decision in the former which holds that the defendant must establish his insanity by a preponderance of the evidence. People v. Schayner, overrules Patterson v. People, 46 Barb. 625, in which it was held, in substance, that the prisoner was bound to prove his justification beyond a reasonable doubt.

80 87 N. Y. 377.

81 *Supra*.

82 So, in Wagner v. People, 4 Abb. Ct. App. Dec. 509. See Klein v. People, 1 Edm. Sel. Cas. 13; People v. Divine, Ibid. 594; People v. Robinson, 1 Park. Cr. C. 649; Mr. H. L. Clinton's argument in the New York Senate, April 15, 1873, and People v. Triple, 1 Wheeler's Cr. Cas. 49, decided at the City Hall of New York City in 1822.

83 Coffee v. State, 3 Yerg. 282; Mitchell v. State, 5 Id. 356; Dove v. State, 3 Heisk. 348; Stuart v. State, 1 Jere Baxt. 178. So, as to an *alibi*, Chappel v. State, 7 Caldw. 92.

84 Cooley, C. J., in People v. Garhutt, 17 Mich. 22; Campbell, C. J., in People v. Finley, 38 Id. 482.

85 State v. Patterson, 45 Vt. 308; and Nebraska, Wright v. People, 4 Neb. 407; and Nevada, State v. Waterman, 1 Nev. 343.

86 40 Conn., 139.

87 See also on the general subject of insanity, Anderson v. State, 43 Conn. 514.

88 18 Wall., 517.

89 Pamphlet Report Sickles' Trial.

90 77 Boston L. Rep. (N. S.), 439 (1854).

91 And see United States v. Lunt, 1 Sprague's Dec. 311; Queen v. Millshire, 20 Am. L. Reg. (N. S.) 723, *note*. But, see, as sustaining our second rule, United States v. McGlue, 1 Curtiss, C. C. 7.

uary 25, 1882, Judge Cox laid down the law that the defendant was entitled to the benefit of any reasonable doubt, and must be acquitted if such doubt exists.

In support of the first rule are, perhaps, the Courts of Delaware, and, possibly, of New Jersey in support of the second, are those of, England, Missouri, Virginia, West Virginia, Massachusetts, Pennsyluania, California, Alabama, Iowa, Ohio, North Carolina, South Carolina, Maine, Kentucky, Texas, Minnesota, Georgia, Arkansas, and, possibly, New Jersey; in support of the third are Kansas, New Hampshire, Indiana, Illinois, Mississippi, New York, Tennessee, Michigan, Vermont, Nevada, Connecticut, and the United States Supreme and Circuit Courts.

The larger number of courts hold that the prisoner must show his insanity by a preponderance of the testimony. In the writer's opinion, the logical and rational rule is, that if a reasonable doubt of defendant's sanity be raised, he is entitled to an acquittal. In this article we can not produce reasons and arguments. Mr. Wharton[92] argues for the preponderating rule. We think his argument somewhat fallacious, and not in the least unanswerable. Indeed, reason is altogether in favor of the more modern view, the third rule. It seems to be "a palpable contradiction" to hold that the jury must convict unless the defendant establishes his insanity by a preponderance of evidence, and to say that the State must establish his guilt beyond a reasonable doubt. Would a verdict not be absurd which read: "We find the defendant guilty of murder, * * * * but we have a reasonable doubt whether or not he was sane when he committed the murder."

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[92] 1 Cr. L. (8th ed.), sec. 62.

WHEN ARE TRUSTEES CHARGEABLE WITH COMPOUND INTEREST.

In considering under what circumstances a trustee (whether as executor, guardian or otherwise) will be held to pay compound interest on trust funds in his hands, I propose to state, not the general doctrines on the subject which are laid down in the text-books and in the opinions of the courts, and which are usually so general as to make them uncertain of application under particular facts, but the actual circumstances under which, in the various cases, compound interest has, or has not, been exacted.

The leading American case in which compound interest was allowed, was that of Schieffelin v. Stewart,[1] in the New York Court of Chancery. In that case it appeared that the defendant, as administrator of an estate, had had the funds in his possession for ten years after all the debts were paid, having, during that time, large sums in his hands, never less than $33,000, which, instead of distributing or investing, he had used in his own business, and in making large loans for his private benefit, not accounting to the estate in any way for interest or profits on the fund. Chancellor Kent sustained the master's report, charging the defendant with compound interest, on the ground that it was his duty to account for all profits on the trust fund, and as he had not disclosed, as he might have done, what profits he actually realized, the interest should be compounded.

In Hook v. Payne,[2] in the Federal Supreme Court, it appeared that the plaintiff in error, as administrator, had mingled the trust funds with his own, and used them in speculation for his own profit, collecting notes due the estate and bearing interest, without accounting for the interest so collected, or for any interest or profits realized by him in the use of the fund. He was also guilty of attempting to make a fraudulent settlement with the distributees. The court affirmed the decree of the court below by which the administrator was charged with compound interest, being of the opinion that, under the circumstances, he should be held to account for all that he might have made by the use of the money, it appearing by the findings in the court below that he might have invested and reinvested annually at the rate charged.

In Williams v. Petticrew,[3] and Estate of Camp,[4] compound interest was charged on moneys coming into the trustees' hands, and

[1] 1 Johns. Ch., 620.
[2] 14 Wall., 252.
[3] 62 Mo., 460.
[4] 6 Mo. App., 563.

not reported as assets, but mingled with private funds and used in business; and in Bradford v. Bodfish,[5] it was allowed as against a guardian for failure to invest the trust fund. In none of these three cases is any general rule announced on which compound interest is to be allowed, nor is there any discussion of the question on authorities, and they go further than other well considered cases seem to justify.

In Boynton v. Dyer,[6] the Supreme Court of Massachusetts say that the circumstances would justify the allowance of compound interest if there was occasion for applying the rule, but as the annual disbursements had exceeded the annual interest, there was no occasion for compounding. It appears the guardian in that case had had the use of the ward's property during a long guardianship, but whether there had been delinquency of any other kind, does not appear.

These are all the cases I have been able to find in which compound interest against trustees has actually been allowed in this country. Two or three which I have not been able to examine,[7] are frequently cited in support of the right to charge the trustee with compound interest in extreme cases, but such references as I have been able to find to them lead to the conclusion that they maintain such right (which was in some early cases stoutly denied, but is not now questioned in courts of equity) without making application of the principle under the particular state of facts, passed upon.

It will be instructive to note a few important cases in which compound interest has been claimed, but not allowed. In Barney v. Saunders,[8] the Supreme Court of the United States affirms a ruling below, by which trustees were charged with interest on such sums of interest as fell due on investments drawing annual interest, but in such manner that only simple interest should be charged against them for balances remaining uninvested; saying that in case of wilful and gross neglect, or use of funds by trustees, with failure to account for profits, "interest is compounded as a punishment, or as a measure of damage for undisclosed profits, or in place of them. For mere neglect to invest, simple interest only is generally imposed."

In Utica Ins. Co. v. Lynch,[9] it appeared that a receiver had mingled trust funds with his own, and even loaned them out for his own benefit, but he was only charged simple interest; and a similar decision was made in Garniss v. Gardner,[10] a suit against an administrator, although he had regularly received the dividends on certain stock belonging to the estate, and applied them to his own use without accounting for either the amounts so received or the profits thereon. In De Peyster v. Clarkson,[11] the court expressly directs that the accounts of an executor should be so settled as not to charge him with compound interest, although he had an average balance of $5,000 in his hands for twenty years, which he had used in his own business.

The Supreme Court of Pennsylvania, in some of the earlier cases before it, very vigorously maintained that the right to charge a trustee with compound interest in case of gross delinquency, existed both in reason and on the authorities;[12] but in no case was the rule ever applied, and it seems not now favored.[13]

Without tracing out the course of the decisions of the English courts, the late case of Burdick v. Garrick[14] may be referred to. The defendants, as trustees, had received sums from the trust estate which one of them, a solicitor, had deposited with the funds of his firm, and which had thus been used by the firm. The vice-chancellor charged the trustees with interest on the amount not accounted for, computed with semi-annual rests; but the court of appeal in chancery refused to confirm the decree as to semi-annual rests, and ordered that only simple interest be charged, on the ground that compound inter-

[5] 39 Iowa, 681.
[6] 18 Pick., 1.
[7] Especially Wright v. Wright, 2 McCord's Ch. (S. C.) 185, and Karr v. Karr, 6 Dana (Ky.), 3. [Both these cases are to the effect, briefly, that where it appears that the trustee had the fund so invested, or the opportunity of so investing it, that interest was made, or could be made, but no returns had been made by him showing the sums actually realized then he would be charged with compound interest.—ED. CENT. L.J.]
[8] 16 How., 535, 542.
[9] 11 Paige Ch. 520.
[10] 1 Edw. Ch. 128.
[11] 2 Wend. 77.
[12] Harlan's Accounts, 5 Rawle, 353; Luken's Appeal, 6 Watts. & S. 48.
[13] Dietterich v. Heft, 5 Pa. St. 87; Norris' Appeal, 7 Id. 106, 123.
[14] L. R. 5. Ch. App. 233 (decided in 1870).

est, in accordance with the rule in the case of Attorney-General v. Alford,[15] is not allowed as a punishment against the trustee for using the trust fund, but upon the principle that he has made, or that he has put himself into such position as that he is presumed to have made, compound interest, for which he is to be held accountable as profits; and say that, to give rise to such presumption, it must appear that some use was made of the money, such as usually produces profits equal to compound interest, in the absence of which only simple interest will be presumed. As in this case, the money was mingled with the funds of solicitors, it was held that no presumption would arise that compound interest had been realized, the business not being such as to usually produce such interest on funds invested therein.

Generalizations are hardly safe, but it is evident that, first, to justify a compounding of interest against the trustee, there must be a breach of duty in the management of the fund; for without this even simple interest should not be taxed, either for failure to invest or even for mingling the trust fund with private moneys, unless it appears that, in the latter case, some profits were realized;[16] secondly, where there is a breach of trust in failing to invest when that is the proper course, or in mingling the trust funds with private moneys, in violation of duty, interest will be charged, but it will not be compounded for failure to invest, unless, perhaps, in case of gross delinquency;[17] nor for mingling with private funds, unless such funds are so used that profits are realized; in which case, if the profits are not disclosed so as to be recoverable by the beneficiary as such, compound interest will be given to cover what profits may have been realized.[18]

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[15] 4 De G., M. & G. 842.

[16] Rapalje v. Hall, 1 Sandf., Ch. 399; Radford v. Folsom, 55 Iowa, 276.

[17] Boynton v. Dyer, 18 Pick. 1; Bradford v. Bodfish, 39 Iowa, 681; 2 Kent Com. 231.

[18] Schieffelin v. Stewart, 1 Johns. Ch. 620; Hooke v. Payne, 14 Wall. 252; Harlan's Accounts, 5 Rawle, 353, Spear v. Finkham, 2 Barb., Ch. 211.

EQUITY—MISTAKE—REFORMATION OF DEED.

ELLIOTT v. SACKETT.

United States Supreme Court, October Term, 1882.

By a written agreement between S and E, S agreed to convey land to E, "subject to" an incumbrance on it of $9,000, and E agreed to pay to S $15,000, by conveying to him land, some of it "subject to" an incumbrance. Without any further bargain, S delivered to E a deed, conveying the land "subject to" the incumbrance, and also containing a clause stating that E assumes and agrees to pay the debt secured by the incumbrance, as part of the consideration of the conveyance. E, being ill, did not read the clause in the deed respecting the assumption of the debt, but discovered it afterwards, and promptly brought this suit to have the deed reformed. He had made two payments of interest on the incumbrance. In the negotiations prior to the agreement, S, through his agent, had solicited E to assume and agree to pay the incumbrance, but E refused. S understood the difference in meaning between the two forms of expression. D, the owner of the incumbrance, was no party to the transaction, and had done nothing in reliance on the deed. He was, on his own application, made a party to the suit, and also filed a cross-bill for a foreclosure of the incumbrance, and the enforcement of a personal liability against S and E for the debt. The circuit court made a decree dismissing the bill in the original suit, and adjudged that E had agreed with S to pay the amount due on the incumbrance; that S and E, or one of them, should pay the debt due to D, and in default thereof the land should be sold and the deficiency reported; and that if S should pay any part of the debt he might apply for an order requiring E to repay the amount to him. On an appeal by E: *Held*,

1. The decree was a final decree, as to E.

2. The amount involved in the original suit was $9,000.

3. The agreement created no liability on the part of E to pay the debt to D.

4. There was a departure in the deed, through mutual mistake, from the terms of the actual agreement.

5. Under the special circumstances of the case E had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches in not observing the provisions of the deed as should preclude him from relief, nor was he guilty of any laches in seeking a remedy.

6. The payment by E of interest on the incumbrance was not inconsistent with his not having assumed the payment of the debt.

7. E is entitled to have the deed reformed. The case of Snell v. Insurance Co., 98 U. S. 85, cited and applied.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice BLATCHFORD delivered the opinion of the court:

In February, 1876, George A. Sackett and John A. Elliott executed a written agreement under seal, which provided that if Elliott should first make the payments and perform the covenants thereinafter mentioned on his part to be made and

performed, Sackett agreed to convey to him "in fee simple, clear of all incumbrances, except as stated, whatever," by a warranty deed, "the house and lot known as No. 166 Calumet avenue, the lot 50x127 feet," in Chicago, Illinois, and to assign the insurance policy then "on said improvements," and to pay to Elliott $50; that Elliott agreed to pay to Sackett $15,000, "subject to an incumbrance on said property" of $9,000, "in the manner following: Lots 8, 9 and 10, block 5, Pittner & Son's addition to So. Evanston, being 150x200 feet, subject to an incumbrance of $1,750, and interest at 8 per cent, from June, 1873, also lot one (1), block seven (7), Grant's subdivision of So. Evanston, and one hundred and twenty acres of land, Palo Alto Co., Iowa; the two last named pieces of property are clear of incumbrances; and title to pass by good and sufficient warranty deeds; and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said lots, except and after the fourth instalment of South Park assessment;" and, in case of the failure of Elliott to make either of the payments, or perform any of the covenants on his part, the contract to be forfeited and determined, at the election of Sackett, and Elliott to fulfil all payments made by him on the contract, and such payments to be retained by Sackett in full satisfaction and liquidation of all damages by him sustained, and he to have the right to re-enter and take possession.

By a warranty deed dated March 8, 1876, acknowledged the same day, and recorded March 10, 1876, Sackett and his wife conveyed to Elliott the Calumet avenue property, by a proper description. The deed expressed a consideration of $15,000, and contained this clause: "This conveyance is made subject to a trust deed executed by the parties of the first part" (Sackett and wife) "to John De Koven, on the (10th) tenth day of May, 1870, securing the notes of said George A. Sackett to Hugh T. Dickey, for nine thousand dollars, due four years from that date, with interest of nine per cent. per annum, interest payable semi-annually; and a further extension of payment commencing on the tenth day of May, 1874, for the same amount above mentioned (nine thousand dollars), payable in five years from said date, with interest of nine per cent., the interest notes payable semi-annually, which debt, with its interest, the said party of the second part" (Elliott) "assumes and agrees to pay as part of the consideration of this conveyance, or purchase price above stated. The covenants hereinafter are subject to the above incumbrance." Then follows covenants of seizin and warranty and against incumbrances.

The controversy in the present case arises out of the difference between the written agreement executed by the parties and the deed to Elliott, there being no question as to the conveyances by Elliott of the land which he agreed to convey. By the agreement the Calumet avenue property was to be conveyed subject to the $9,000 incumbrance. By the deed the conveyance is not only made subject to the incumbrance, but Elliott is made to assume and agree to pay the $9,000 debt as part of the consideration of the conveyance or purchase price of $15,000.

In April, 1877, Elliott filed a bill in a State court of Illinois against Sackett, praying that the deed be reformed by striking therefrom the words stating that Elliott assumes and agrees to pay the $9,000 debt, as part of the consideration. The bill alleges that the consideration for the agreement of Sackett to convey the Calumet avenue property to Elliott was the agreement of Elliott to convey to Sackett the other property named in the written agreement; that one Hill, as agent of Sackett, solicited Elliott to purchase the Calumet property; that, during the negotiations, Hill and Sackett solicited Elliott to assume the payment of the incumbrance, but Elliott refused to assume any liability on account of it, and insisted that he would simply purchase the property subject to the incumbrance, and thereupon the written agreement was made; that the statement in the deed that Elliott assumes and agrees to pay the incumbrance as a part of the consideration for the premises was contrary to the mutual understanding between Hill and Sackett and Elliott, and contrary to the written agreement; that Elliott, when he received the deed, was suffering under physical infirmities and mental distress, and did not examine the deed as carefully as he should otherwise have done, but had the deed recorded, believing that Sackett had acted in good faith, and had made the deed in conformity with the understanding of the parties and the written agreement; and that Elliott had recently discovered the mistake in the deed.

In June, 1877, Dickey, the owner of the $9,000 note made by Sackett and secured by the deed of trust, was, by an order of the State court, on his petition, made a defendant in the suit and allowed to file an answer and a cross-bill. His answer controverts the material allegations of the bill. A few days later, on the petition of Dickey, the suit was removed into the Circuit Court of the United States for the Northern District of Illinois, and Dickey filed a cross-bill, in the latter court, making as defendants Sackett and his wife, De Koven, the trustee, Mattocks, his successor in the trust, Elliott and Underwood, the tenant of Elliott. The cross-bill alleges that the whole amount secured by the note and the trust deed is due, and that by the terms of the conveyance to Elliott he became liable to pay the debt to Dickey, and prays for a sale of the premises to pay the amount due, and a foreclosure of the equity of redemption of the defendants, and the payment of the debt out of the proceeds of sale, and a decree against Sackett and Elliott for any balance due beyond the proceeds of the sale.

Sackett answered the original bill. The answer admits that Sackett entered into an agreement in writing to convey the premises "in a certain manner and on certain conditions," the

exact words and terms of which he does not remember. It admits that Sackett, at the time of the negotiations with Elliott for the sale of the premises, solicited Elliott to assume and agree to pay the incumbrance of $9,000. It then proceeds: "And this respondent denies that the said complainant refused the said solicitations and request of this defendant; but this respondent avers and will, at the proper time and place, prove the truth to be, that when the negotiations, conversations and details preliminary to the final completion of the transactions upon which this suit was brought, were ended, and the parties were ready to close the transaction by the delivery of the deeds, it was fully and fairly understood by the parties to the same, that a warranty deed conveying the said premises, 166 Calumet avenue, should and would be accepted by the said Elliot with the condition of conveyance therein provided, viz., that the said Elliott did assume and agree to pay, as a covenant of said deed, the before-mentioned $9,000, and interest semi-annually, and the warranty deed of this defendant contained that provision accordingly." The answer also avers that Elliott carefully read over the deed in the office of Hill, at the time of the delivery of the papers in the transaction, in the presence of Sackett, "being fully aware of and noting especially, as this defendant believes, from his best recollection, the said clause in said deed which complainant now desires shall be expunged."

In March, 1878, Elliott answered the cross-bill, setting up that the clause in the deed from Sackett and wife as to the agreement by Elliott to pay the incumbrance, was inserted by mistake or fraud on the part of Sackett or his agent, and repeating the averments of his original bill.

Replications were filed to the answer of Sackett to the original bill and to the answer of Elliott to the cross-bill, and the cross-bill was taken as confessed as to the other defendants in it, and the cause was referred to a master to take proofs and report the same to the court, with the amount due to Dickey. Proofs were taken and causes were brought to a hearing thereon. The court made a decree dismissing the original bill for want of equity, and adjudging that all the material allegations in the cross-bill are proved; that the equities are with Dickey; that there is due to him from Sackett $11,399.28, with interest; and that Elliott, for a valuable consideration, assumed and agreed with Sackett to pay the amount due on the mortgage to Dickey. The decree then provides that Sackett and Elliott, or one of them, shall pay to Dickey, within one day from the date of the entry of the decree, the amount so due to him, with interest and costs of suit, and that, in case the payment is not made, the premises be sold by a master, and that he report any deficiency in the proceeds of sale to pay the amount due. The decree concludes with providing that in case Sackett shall pay such indebtedness, or any part thereof, he shall have leave to apply to the court, on notice to Elliott, for a further order, at the foot of the decree, requiring Elliott to repay to Sackett the sum so paid on said indebtedness. Elliott has appealed to this court.

It is objected by the appellee, Dickey, that there is nothing in the record to show that the amount in controversy exceeds $5,000; and that the decree, so far as Elliott is concerned, is not a final one. It is urged that the provision of the decree is, that, if the amount specified is not paid to Dickey within one day, the premises shall be sold, and, if the proceeds of sale are insufficient, the master shall report the amount of the deficiency; that this is not a deficiency decree against Elliott; that it does not appear that it will ever be necessary to enter a deficiency decree against any one; that, on the decree, as it stands, no execution can be issued against any one; that all the evidence goes to show that the deficiency decree will not exceed $2,000; and that the decree is merely interlocutory as to Elliott, because, until a sale is made, there can be no cause of complaint on the part of Elliott. The answer to this objection is, that the decree dismisses the original bill, and adjudges that Elliott agreed with Sackett, for a valuable and sufficient consideration, to pay the amount due on the incumbrance. The amount involved in the original suit is the entire amount of the incumbrance, which Elliott is made by the deed to him to agree to pay, and the bill seeks relief from liability for that amount, by striking out the clause from the deed. The decree denies that relief. If that relief was wrongly denied, all relief against Elliott under the cross-bill necessarily falls, as the only liability from Elliott to Dickey arises from that clause in the deed.

On the merits, we are of opinion that Elliott is entitled to the relief he asks by his original bill. The terms of the written agreement between Sackett and Elliott are very clear, and show that the parties were merely making an exchange of land. Sackett agrees to convey to Elliott the Calumet avenue property, subject to the $9,000 incumbrance, and to assign an insurance policy, and to pay $50. Elliott agrees to convey to Sackett three lots subject to a specific incumbrance, and two other pieces of property clear of incumbrance. It is true, that Elliott agrees to pay to Sackett $15,000, but the agreement expressly states that the sum is to be paid "in the manner following," which is by conveying the land described. The land to be conveyed to Sackett is apparently valued by the agreement, for the purposes of the transaction, at $15,000. Nothing is said about deducting the $9,000 from the price of the property to be conveyed to Elliott, nor is any sum named as the purchase-money of that property. An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form tha

he assumes the payment of a mortgage, does not bind himself personally to pay the debt. There must be words importing that he will pay the to make him personally liable. The language of the agreement in the present case does not amount to such an undertaking on the part of Elliott. It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee. Such is the law in Illinois, where this land is situated (Comstock v. Hitt, 37 Ill. 542; Fowler v. Fay, 62 Id. 375), as well as the law in other States. Belmont v. Coman, 22 N. Y. 438; Fiske v. Tolman, 124 Mass. 254.

Under the written agreement, therefore, it is plain that Elliott assumed no personal liability. Both parties executed this agreement and are to be held to have understood it in that sense. Sackett, in his answer, does not deny the allegation of the original bill, that the agreement between the parties was, that neither Sackett nor Elliott should assume or agree to pay outstanding incumbrances on the respective parcels of land, and that that appears by the written agreement. But the answer, while admitting that Sackett entered into an agreement in writing to convey the premises in a certain manner and on certain conditions, and referring to such agreement for certainty, sets up, that, after the written agreement was made, the parties came to an understanding that Elliot would accept a deed whereby he should assume and agree to pay the $9,000 incumbrance, and that the deed given "contained that provision accordingly." There is no evidence to support this allegation. Sackett testifies that he never had any conversation with Elliott in regard to his assuming liability for the mortgage, but that they met together and the deeds to each other were passed. Sackett had employed Hill as his agent to dispose of the Calumet avenue property. Elliott testifies that Hill offered him the property and wanted him to assume the incumbrance, but he refused, and that finally Hill brought in the agreement which was signed by both parties. Hill testifies to the same effect. Elliott says that when Sackett gave him the deed in Hill's office, he was unwell; that he did not read that part of the deed which states that he is to assume and pay the incumbrance, but only read the prior part which states that the conveyance is made subject to the incumbrance; and that he discovered the mistake in the deed a short time before he commenced this suit.

The actual contract of the parties, as understood by both of them, is shown by the written agreement. Nothing was agreed upon to vary that. Sackett, as he shows by his testimony, knew the difference as to liability which the difference in the language would make, and knew what the language of the written agreement was, and must be held to have understood it to mean what it does mean, and to have known that Elliott must have understood it in the same sense. So, in the departure from it in the deed, there was a mutual mistake, it not being shown, as set up in the answer of Sackett, that there was an intention, fully and fairly understood by both parties, that in the deed Elliott should assume and agree to pay the incumbrance. Under all the circumstances proved in this case (and every case of the kind must depend very largely on its special circumstances), Elliott had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches, in not observing the provisions of the deed, as should preclude him from relief.

Neither Dickey nor the trustee was a party or a privy to the transaction between Sackett and Elliott, nor was the trust deed taken, or the debt created or extended, or anything else done by Dickey or his trustee, in reliance on any assumption of the debt by Elliott. As respects the trust deed, the parties to it and to the debt it secured occupy the same position when this suit was brought as when the deed to Elliott was delivered, no new rights having been acquired in reliance on that deed, and none which existed when it was delivered being sought to be impaired by the relief asked by Elliott. Elliott does not seek to interfere with the property he conveyed to Sackett. No circumstances exist on which laches can be predicated on the part of Elliott as to seeking a remedy. The fact that Elliott made two payments of the interest on the incumbrance is not inconsistent with his not having assumed the payment of the incumbrance. As owner of the property subject to the incumbrance and desirous of retaining it so long as there was any value in the equity of redemption, he would naturally pay the interest to save a foreclosure.

The principles applicable to a case like the present, are fully set forth in the opinion of this court delivered by Mr. Justice Harlan, in Snell v. Insurance Co., 98 U. S. 85, and the leading authorities on the subject are there collected. Within those principles this is a case where, in the preparation of the deed to Elliott, there was, by mutual mistake, a failure to embody in the deed the actual agreement of the parties as evidenced by the prior written agreement. The meaning of that prior agreement is clear, and nothing occurred between the parties, after it was signed and delivered, to vary its terms, except the mere fact of the delivery of the deed, the terms of which are complained of and sought to be reformed. The deed did not effect what both of the parties intended by the actual contract which they made, and the case is one for the interposition of a court of equity.

The decree of the circuit court is reversed, with costs, so far as it dismisses the original bill, and so far as it adjudges that Dickey has any equities as against Elliott, and so far as it adjudges that Elliott assumed and agreed to pay the amount due on the mortgage to Dickey, and so far as it adjudges that Elliott shall pay to Dickey the amount found due to him and the costs of the suit, and so far as it provides for an application

by Sackett for an order that Elliott repay to him any sum which he may pay on the debt due to Dickey; and the cause is remanded to the circuit court, with directions to enter a decree in the original suit granting the prayer of the bill, with costs, and for such further proceedings in the original and cross suits as may not be inconsistent with this opinion.

AGENCY—ACTING FOR OPPOSING INTERESTS—EXCEPTION TO THE RULE.

BARRY v. SCHMIDT.

Supreme Court of Wisconsin, February 20, 1883.

1. An agent who is employed to sell lands at a fixed price, and who, after finding a purchaser at that price, with the knowledge of the vendor acts as the agent of such purchaser in signing his name to the contract of sale, is entitled, nevertheless, to recover from the vendor the agreed commission on the sale.

2. A party who does not request the court to find upon a particular issue, and who makes no objection at the time to the failure of the court to find thereon, waives thereby all objection to the deficiency of the findings in that respect.

Appeal from the Circuit Court of Trempealeau County.

E. Q. Nye, for respondent; *Allen & Williams*, for appellant.

ORTON, J., delivered the opinion of the court:

The first error assigned is that the circuit court refused to order a non-suit on the case made by the plaintiff.

On behalf of the plaintiff it was substantially proved that he was employed by the defendant to find a purchaser for her land at the price of $1,500, for which service she agreed to pay him the sum of $100; that the plaintiff, on behalf of the defendant, proposed to sell the land to one Thomas Troog for that sum, and that Troog looked at the land, accepted the proposition, and authorized the plaintiff to sign the contract for him on such purchase, and that he did so sign the name of Troog to the contract in the presence of the defendant, and Troog afterwards paid up for the land at that price, and received a deed therefor from the defendant. It is contended by the learned counsel of the appellant that this evidence placed the plaintiff in the inconsistent attitude of agent for both the defendant as the seller, and Troog as the purchaser, of the land, and that he can, therefore, recover from neither for his services. It is perfectly well settled by the decisions of this court, as well as by the current of authority elsewhere, that the same person can not be employed by the seller and the purchaser of the same land, by the first to sell and by the other to purchase, where their interest in the services of such person are in any respect adverse or antagonistic, or where his will, discretion or judgment is to be, or may be used, adversely to both, and recover for his services from either. Myro v. Hanchett, 39 Wis. 419; S. C., 43 Wis. 246.

This principle is not controverted by the learned counsel of the respondent, but his contention is that this case, so far as made by the evidence, falls within the exception equally well established by the authorities, that the agent may be employed by and recover from both parties as a mere "middleman" to bring them together, and when he has nothing to do in fixing the terms of the bargain, as in Herman v. Martineau, 1 Wis. 151, or that the agent may be employed by the seller to find a purchaser at $15 per acre for a commission of 5 per cent., and may recover such commission if he brings the parties together and the sale is consummated by them either at that price or less, even though the agent himself becomes interested in the purchase with the knowledge of the seller, as in Stewart v. Mather, 32 Wis. 344. Chief Justice Dixon says, in his opinion in that case: "A broker whose undertaking merely is to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meets, is in reality only a 'middleman,' whose duty is performed when the buyer and seller are brought together, and as to whom the policy of the law which excludes double compensation has been considered inapplicable," and cites Mullen v. Keitzleb, 7 Bush, 253; Kupp v. Sampson, 16 Gray, 398; and also Herman v. Martineau, *supra*.

The general principle and the exception are well established, both by reason and authority. When an agent is thus employed by one party to sell and by the other to purchase, and is vested with any discretion or judgment in the negotiation, his duties are in conflict, and in respect to adverse interests, and he can not fairly serve both parties. In such case it is his duty to obtain the best possible price for the seller, and the lowest possible terms for the buyer. If the contract to employ and pay a compensation by either party is made with the knowledge and assent of the agent's employment by the other party in the same transaction, of course he can not complain, and should be held to pay the compensation agreed upon; but when otherwise it is a fraud upon the other party, and he is exempt from liability to the agent. This adverse interest of the parties, and this conflicting and inconsistent duty of the agent lies at the bottom of this principle, and the exception is founded upon the absence of this adverse interest of the parties, and upon the concurrence of the duty of the agent toward both parties alike; as where the price is fixed by the seller, and merely accepted by the purchaser through the procurement of the agent, or where no terms are fixed by the agent, and the agent acts as the mere middleman to bring the parties together for a negotiation and contract to be made by themselves. Tested by these rules, the case made by the plaintiff clearly falls within this exception. The price was fixed by the defendant,

and the plaintiff procured the purchaser, Troog, to accept these terms. It is not shown that he had anything to do with the negotiation any further than this. It did not even appear that Troog employed the plaintiff to purchase for him on these terms, but only that he should sign his name to the contract in his absence, which de did in the presence of the defendant, after Troog had personally accepted the terms proposed, after inspection of the land. The circuit court, therefore, properly refused to direct a nonsuit.

The second error complained of in order is that the findings are indefinite and uncertain, and do not warrant the judgment.

The findings are that the defendant is a married woman, and that the contract of employment of the plaintiff concerned her separate property, and that she authorized the plaintiff to sell for her the land for $1,500, for which service the defendant promised to pay him $100, and that the plaintiff did so sell the land and has never been paid. There can be no question but that these findings warrant the judgment. The contention on this point is virtually that the circuit court improperly failed to find that the plaintiff was employed by the purchaser Troog to make this purchase for him, and that afterwards he accepted the employment of the defendant to sell the land for the sum of $1,500, without her knowledge of such previous employment by Troog, and that, therefore, the plaintiff was interested in inducing the defendant to take less for the property than she otherwise would, in order to favor the party who first employed him to buy the land. If it were true that the plaintiff was first employed by Troog to buy this land for him on the best possible terms, and he afterwards, without informing her of this employment, and without her knowledge thereof, accepted employment by the defendant ro sell the land, and induced her to consent to take less than she otherwise would have exacted, then we are not prepared to say that this contract of employment would not come within the principle of adverse and inconsistent employment of the agent by both parties.

There may have been some testimony tending to such a conclusion, but the finding is silent as to any such issue of fact, and there was no request on the part of the defendant that the court should find on such issue, and there was no objection made or exception taken at the time to the failure or omission so to find, and therefore such deficiency of the findings was waived. The rule in such case is properly laid down by Mr. Justice Taylor, in Wrigglesworth v. Wrigglesworth, 45 Wis. 255, as follows: "If the defendant desired that there should have been any particular finding of fact he should have called the attention of the court to the matter of fact upon which he desired a separate finding, and when the court found upon the facts so pointed out should have taken an exception if the finding was not satisfactory." Such is the rule also as to the special verdict of a jury. Schultz v. Ry. Co., 48 Wis. 375; s. c., 4 N. W. Rep. 399. The plaintiff in his testimony denied that he was employed by Troog to make the purchase for him. It was therefore a disputed question, upon which the court must be presumed to have found in favor of the plaintiff, and this court would not be warranted in finding otherwise. As the case is presented to this court on the record, there appears to have been no error in the rulings of the circuit court.

The judgment of the circuit court is affirmed.

LIMITATIONS — CONSTRUCTIVE TRUSTS.

BAKER v. KENNEDY.

Supreme Court of Texas, March 20, 1883.

1. The statute of limitations runs in favor of a defendant chargeable as trustee of a constructive trust. The rule requiring the trustee to repudiate and hold adversely to the trust, does not apply in such a case.

2. In the absence of fraudulent intent and concealment on the part of such a trustee, mere ignorance of the *cestui que trust* of his rights will not prevent the statute from running against his interest.

Appeal from Harris County.

E. P. Hill, for appellant; *A. R. Masterson*, for appellee.

WALKER, P. J., delivered the opinion of the court:

We are clearly of the opinion that the plaintiff's cause of action, as shown under the pleadings and evidence, was barred by the statute of limitations at the time he instituted his suit. More than two years had elapsed at that time since the date of the note given by the railway company to the defendant for the trust deposit made by White for the benefit of Shirley. The note was executed and delivered, according to the evidence, before its maturity. The note was dated March 20, 1877, payable at six months, and it was by the defendant converted into bonds in the transaction he had with the railway company in the month of July, 1877, when he acquired from the company certificates for the 100 bonds of $1,000 each, and which, at a later date, the company took up, and the contemplated bonds were delivered to the defendants as provided for by the certificates. The cause of action accrued to Shirley as soon as the defendant Baker obtained possession or control of the money which belonged to Shirley. The transaction between White and the railway company through the defendant, at that time its vice-president, and the transaction subsequently between the defendant and the company, made at his request, through which he obtained the company's promissory note for the principal and interest of Shirley's money, constituted an effectual conversion of the deposit by the act of the defendant into assets of Baker, which the railway company held in the capacity of debtor to Baker. This conversion constituted Baker, by operation of law,

a trustee. The trust was not an express trust; the trust was not created by a contract whereby he assumed the position and relation of trustee, but the law imposed upon him the obligations which had attached to the railway company as trustee of the fund for the benefit of Shirley.

The statute of limitations commenced to run against Shirley as soon as his right accrued to demand from Baker the money which he had received from the railway company. When Baker recognized the money as being within his possession and control (which he did do by taking the note of the company for the same, with interest) he became subject *eo instanti*, to Shirley's right to demand and receive the same from him. Consequently, the Statute of Limitations began then to run, and when suit was brought by Kennedy on the 31st day of October, 1879, the bar of two years had become complete.

Against this view of the subject the plaintiff interposes the objection that if the relation between Shirley and Baker was that of *cestui que trust* and trustee, the latter could not invoke such a defense except by his having repudiated such trust relation, and having held the fund adversely to Shirley, claiming the money absolutely as his own. This proposition has no proper application to this case; the nature of the trust with which Baker was affected in this transaction, does not pertain to that kind of trust to which the above rule of law relates. See Wingate v. Wingate, 11 Tex. 433; Tinnen v. Mebane, 10 Tex. 252.

"The doctrines of trusts are equally applicable to real and personal estate, and the same rules will govern trusts in both kinds of property." Perry on Trusts, sec. 16.

This trust was a resulting trust; the transaction was such that the courts will presume that the defendant, under the facts of the case, intended to hold the money of Shirley on the same terms as the railway company engaged to do when it received it from White. That company received the money on the conditions specified in the receipt of Baker, its vice-president, dated December, 1873, as follows: "Office of the Houston & Texas Central Railway Company: Henry K. White has deposited with the Houston & Texas Central Railway Company $1,500 in gold, subject to the order of W. B. Wasson, or whom it may concern, being the amount of money deposited with him by Thos. M. Shirley to pay said Shirley's draft in favor of W. B. Wasson, which Wasson has not called for.

(Signed) W. R. BAKER,
Vice-President."

The evidence shows that the money thus deposited was not for the benefit, use or control of White, but for the benefit of Shirley, and that the latter adopted and confirmed the action of White in the premises, and that the railway company accepted and recognized the transaction as being of that character. It was a breach of the trust for the railway company to pay the money to Baker on his request. Baker obtained it without consideration, and whether he had had notice or not of Shirley's equities and rights, he would be constituted a trustee for Shirley. "If the trustees convey the estate by a breach of the trust, the *cestui que trust* may follow the estate into the hands of a volunteer, whether he had notice or not; and into the hands of a purchaser for value, if he had notice of the trust. * * * * The purchaser under such circumstances becomes a trustee, and liable in the same manner as the person from whom he purchased; for knowing another's rights to the property he throws away his money. Even trover may be maintained against a purchaser in breach of the trust with full knowledge of the trust. And this applies not only to direct or express trusts, but also to constructive trusts, equitable incumbrances and liens for the purchase-money." 2 Perry on Trusts, sec. 828, and authorities there cited. Baker had full knowledge of all the facts when the railway company received the money, and thenceforth throughout; but that fact is not, it seems, required to exist in order to affect his liability as a trustee. "A mere volunteer, or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, whether he have notice or not; for in such case, no wrong or pecuniary loss can fall upon him in compelling him to execute the trust to which the property that came to him without consideration, was subject. 1 Perry on Trusts, sec. 217. It is obvious that Baker is chargeable as a trustee, and that the trust is a constructive trust. The character of the trust is one, however, that is within the operation of the Statute of Limitations.

In Wingate v. Wingate (11 Tex. 433), Justice Lipscomb said: "But it does not follow that every kind of trust forms an exception to the operation of the Statute of Limitations; if so, half the business transactions of men would be removed from its influence. And the doctrine has been settled by a train of decisions from the case of Lockey v. Lockey, Prec. in Ch. 518, decided by Lord Macclesfield, down to the present time, that to remove a trust from the operation of the statute, it must be such a trust, technically, as is created by the mutual confidence of the parties; such as equity alone can take cognizance of and afford redress. If it is a trust that common law courts could give relief, the statute will run, although the party may have sought his relief in chancery. In such cases, the fact of the suit being brought in the court of chancery will not defeat the statute; it can be avoided only by a technical trust of which the courts of common law could afford no relief. When it is laid down that so long as a trust is continuing and subsisting, the statute does not commence to run between the *cestui que trust* or his assigns and their trustee, the doctrine applies to such cases only as are strictly and technically trusts, created and sustained by the principles of equitable jurisprudence, exclusive of, and in contradistinction to

trusts of common law cognizance, and even in such cases the statute would commence to run from the time the trustee disavowed the trust, or did any act conclusively showing that he did not hold as trustee."

In Tinnen v. Mebane, 10 Tex. 252, it is laid down by Chief Justice Hemphill that, "all trusts which are cognizable at law are not withdrawn from the operation of the statute. Persons who receive money to be paid to another, or who misapply money placed in their hands for a particular purpose, the reciprocal rights and duties founded upon the various species of bailments, as between hirer and letter to hire, borrower and lender, and depositary and persons depositing, etc., are cases of express and direct trust; but being cognizable at law, are within the reach of the statute. * * * * All implied and constructive trusts, all which are cognizable at law, are subject to the bar of limitation; and equity applies the same limitation to equitable demands that is applied in analogous cases at law. It is only where the trust is the mere creature of equity—exclusively cognizable within that jurisdiction, and is a subsisting, continued and acknowledged trust—that the statute has no operation."

The rules of law thus elaborately and clearly laid down by our Supreme Court in the two cases quoted from, place it beyond question that the statute of limitations commenced to run against Shirley, certainly, from the period at which Baker became chargeable as a trustee, by implication, of the fund. His wrongful and unauthorized acquisition of the money subjected him to an action at law for the money without the necessity of a previous demand for it by Shirley. "Trover may be maintained against a purchaser in breach of the trust with full knowledge of the trust." Kitchen v. Bradford, 13 Wall. 416. And without regard to the form of the action, or of distinctions as to equity, or law jurisdiction of the court in which the remedy might be pursued, it has been seen that trusts of this character do not belong to the kind of trusts against which the statute does not under ordinary circumstances begin to run.

The doctrines on this subject, as laid down by our own court, are maintained also in other States of the Union, and the application which is made of them seems to be consistently regardless of whether the case arises in a court of chancery or a court of law, in those States where, unlike our system, separate jurisdictions are maintained in respect to law and equity. "While the Statute of Limitations may have no application to a technical and continuing trust, which is subject to inquiry in a court of equity only, and the question arises between the trustee and the *cestui que trust*, yet it does apply to a trust, in respect to which there is a remedy at law. The Governor v. Woodworth, 63 Ill. 254; 7 Waite's Actions and Def., 269, citing above and other authorities.

It has been repeatedly held that a trust raised by implication of law is within the operation of the Statute of Limitations. 7 Waite's Actions and Def., 269, and authorities cited. In cases of implied or constructive trust, where it is sought for the purpose of maintaining the remedy, to enforce upon the defendant the character of trustee, such courts will apply the same limitation as provided for actions at law. Waits' Actions and Def., 220, citing Beaubien v. Beaubien, 23 How. (U. S. 190) 207; Elsmendorf v. Taylor, 10 Wheat. 152 177; Sloan v. Graham, 85 Ill. — See, also, Miller v. McIntyre, 6 Pet. 61; Minmo v. Stewart, 21 Ala 682.

This last proposition has a direct application to the merits of this case upon the facts as developed by the evidence. And where a person claiming personal property or the profits of real estate is turned into a trustee by implication or by operation of law, the right of action by the *cestui que trust* will, as a general rule, be subject to the same limitation as a demand purely legal. See Hawley v. Cramer, 4 Conn. 717; Martin v. Bank, 31 Ala. 115; Ashwist's Appeal, 60 Pa. St. 290, which are cited by Waite in his 7 Actions and Def., 270, to support the above proposition.

The doctrines of the law on this subject, as administered in courts of equity as well as of law, are pointedly involved, and distinctly illustrated, in an opinion of much clearness by Judge Green in the case of Haynie v. Hall, 5 Humph. (Tenn.) 290. The action was brought by bill in equity against the executor of the will of the plaintiff's father to recover certain moneys which they alleged came into the hands of the testator in his lifetime, and which belonged to them under the will of their grandfather, who had died many years ago in North Carolina. The money was received by the testator in 1805; the bill was filed in 1842. The defendant (executor) relied on the statute of limitations as a bar to the recovery of the money. The chancellor decreed for the complainants the sum of $225, with compound interest. On the appeal of the defendant, Judge Green said: "But it is argued, and so the chancellor thought, that as regards the money legacy due the complainants from their grandfather's estate, and which it is assumed their father received in 1805, the statute of limitation does not apply; that he held the money as a trustee of such character that a court of equity will not permit him to rely on the lapse of time. The statute of limitations prescribes that certain forms of action shall be barred within the times limited, and, therefore, in its terms it does not apply to courts of equity, but the courts of Chancery, both of Great Britain and this country, have uniformly held, that in cases where any remedy exists at law, if a court of chancery gains jurisdiction of a cause, the time fixed in the statute as a bar to the action at law, will also be a bar to a bill in chancery. All that class of trusts, therefore, that become such by matter of evidence, where a party takes possession in his own right, are equally subject to the operation of the statute of limitations in courts of

equity as would be the corresponding actions prosecuted in courts of law. But in express, or direct trusts, created by the contract of the parties, the statute of limitations does not operate. In such cases, the trustee takes possession and holds for another. His possession is the possession of that other, and there can be no adverse holding until the trustee denudes himself of the trust, by assuming to hold for himself, and notifies the *cestui que trust* of his treachery. In these cases no action at law can be maintained. The remedy is only in a court of equity. The statute of limitations, therefore, has no application to them. Apply these principles to the case before us. The complainants are entitled to a sum of money in North Carolina by the will of their grandfather. Their father procures the executor of Humphrey's will (the grandfather's executor) to pay this money to him. Now, in receiving it, how does he become a direct or express trustee? He stood in no legal relation to the parties by which he was entitled to receive it as an executor, administrator or guardian does; on the contrary, he was their self-constituted agent. He received the money by wrong, and held it in his own right. But having possessed himself of the money of these claimants, they had a right of action against him to recover it, and might have sued him at law for money had and received. The executor of Elijah Humphrey's (the grandfather) will was an express trust; but when Jesse Haynie (the deceased father and testator) received the money from said executor, he was placed in a very different relation to the complainants from that in which the executor had stood. The law, to be sure, would turn him into a trustee, but he did not become such by contract, but was such by implication of law, because of his wrongful possession of money which did not belong to him; nevertheless he held it in his own right and for his own benefit adversely to the complainants."

In Wilmerding v. Russ, 33 Conn., 80, the court said: "A court of equity would undoubtedly declare the sale to be one which was invalid as against the policy of the law and constructively fraudulent, but in cases of constructive fraud the statute of limitations applies. The decisions to this effect are conclusive." Citing Beckford v. Wade, 19 Ves. 88; Murray v. Coster, 20 Johns. 576; Robinson v. Hook, 4 Mason, 151.

Although the plaintiff in his petition alleges an express trust to exist, and charges the defendant accordingly, yet the testimony of Shirley himself, who testified in behalf of the plaintiff, plainly contradicts that allegation, and shows that the trust was a constructive trust. Neither by allegation nor proof did the plaintiff show that Shirley was ignorant of the fact that the railway company held his funds in trust for him, but, to the contrary, alleges and proves his knowledge and recognition of that fact; neither do the pleadings or proof maintain that there was actual fraud between the railway company and the defendant in the transfer of the money to Baker by the company, nor that there was any secrecy or concealment practiced in effecting that transaction. The evidence shows that Shirley knew that Wasson had from the first declined to receive the money from White, and that he had urged White to repay to him the money which he had confided to him to pay to Wasson, but which was thenceforth unavailing for that purpose, because the transaction with Wasson, for which the money was required, had been abandoned by Wasson. Shirley then claimed his money; he could not get it; without his knowledge or consent it was next heard of by him in a "suspense" account kept by the Houston & Texas Central Railway Company, and he became reconciled to permit it to remain there for his benefit. Evidently it was known to all concerned that neither White nor Wasson claimed or desired to have the money, and manifestly no other person than Shirley claimed it, and with no less certainty was it known to all concerned that he alone was entitled to it as between each other; and they all mutually recognized the fund, or were at least estopped by the facts from questioning that the same was a fund held in trust by said company for the benefit of Shirley and subject to his demand. Under these circumstances, in the absence of fraud or concealment practised by the defendant, in order to conceal from Shirley a knowledge of the facts concerning the transfer to himself of the money held by the company for Shirley, there does not appear to us any good reason why the statute of limitations should not commence to run from the 20th day of March, 1877, when Baker received said money by transfer of the railway company.

Fraud will only prevent the running of the statute until the fraud is discovered, or by the use of reasonable diligence might have been discovered. Kuhlman v. Baker, 50 Tex. 630; Alsten v. Richardson, 51 Tex. 1. See Bremond v. McLean, 45 Tex. 11, as to the requirement of the petition to allege facts showing fraud and plaintiff's want of knowledge thereof, when he would avoid the plea of the statutes of limitations. Fraud, coupled with the concealment of the cause of action, will suspend the running of the statute and entitle the plaintiff to an action upon the discovery of the fraud, or at such time as he might have done so by the use of reasonable diligence. Anding v. Perkins, 29 Tex. 348.

The statute was not, however, suspended in this case under the operatton of the rules just stated, for the reasons that there was no issue presented under the pleadings setting up either fraud or concealment, and because it was not alleged or shown by the evidence that Shirley, or his assignee, could not have ascertained, by the use of reasonable diligence, all such facts as were necessary to apprise them of the existence of the cause of action, if any, they or either of them, had. The case and the opinion before cited and so liberally quoted from Haynie v. Hall, 5 Humph. (Tenn.) 293, may be aptly cited here on the point under consideration. The application made by the Su-

preme Court of Tennessee of the rule of law which should govern respecting the ignorance of a party concerning the existence of his right of action, which ignorance resulted in the silence and failure by the party pleading the statute as a defense, to notify the complainant concerning the facts constituting the supposed right of action, seems to be correct and to have proper application to this case.

It was held in that case that "if a person make false representations to the parties interested, by which they were prevented from investigating the matter and ascertaining their right of action, it would be a concealment of the cause of action by fraud, and the statute of limitations would commence to run only from the time the cause of action was discovered; but the mere fact of the failure to disclose rights of record in another State would not constitute the fraud; as *e. g.* where a father received money and property bequeathed to his children by their grandfather from the executor, the will being of record in North Carolina, and failed to disclose the fact to his children."

In this case the deposit was made by White with the company in 1873; the suit was brought about seven years afterwards. Shirley was informed by White as to his action in the matter, and having ratified White's course, he was fully apprised concerning the liability of the company to account to him for the money. The evidence does not show, however, any action taken by Shirley to obtain his money, or to direct its use or management. No impediment is suggested through the pleading or the evidence, to Shirley's obtaining at any time previous to March 20, 1877, his money from the company, or at all events to learn during that period or subsequently as to what had been done with it. If, under these circumstances, by reason of want of due attention to his affairs, he failed to learn at an earlier day than he may have ascertained the facts entitling him to sue Baker, we are of opinion that the statute of limitations commenced to run against him the same as in any case of ordinary account or debt.

The facts upon which the opinion of the Supreme Court rested when this case was formerly here on appeal, seem, from the opinion which was delivered, to have been in certain features different from those shown to us by this record. On the former appeal it was held upon the case before the court that the action of the company in placing the deposit to the credit of Baker, if unauthorized, did not make Baker the trustee of Shirley, in respect to any investments which might be made by Baker with the money so as to inure to the benefit of Shirley; that if it created any liability on the part of Baker to Shirley, it was, at most, a right of action for money had and received or converted to his use and benefit.

The supposed want of privity of contract between Shirley and Baker seems to have influenced, if it did not wholly determine, the conclusion announced in the opinion.

A careful reading of the statement of the case made by the reporter in connection with the opinion, inclines us to believe that the court misconstrued the record as showing that Shirley deposited the money with White as a banker and on general deposit, instead of depositing it as a trust to hold for the purpose of Shirley's draft in favor of Wasson when the same should be presented, and to be returned to Shirley in case Wasson declined to receive it. The opinion on that assumption held that there was no privity between Shirley and Baker. The reporter's statement of the case seems to give a different view of the record from that assumed by the court.

As an illustration, by example given in Perry on Trusts, sec. 14, in respect to privity in estate between those who may be affected through a trust, he says: "And so there must be privity between the persons to be bound by the trust; * * * and so of the trustee to sell the estate of a purchaser with full notice of the trust or confidence, or if he transfer the estate to a volunteer without consideration, the estate and the persons to whom it comes in such manner will be bound by the trust, because there is both privity of estate and of persons. But if the trustee sells the estate to a third person for a valuable consideration, without notice of the trust, neither the estate nor the purchaser for value and without notice will be bound by the trust, for there is in such case no privity between the persons." 1 Perry on Trusts, 12, sec. 14. See also Ib., sec. 223, where it is said that "if in any way a person purchases, with what the law construes to be full notice that another has a legal or equitable title to the property, or that he has been deprived of his interest by accident, mistake or fraud, he will be held as trustee."

Under the facts relied on by the plaintiff in the case as last tried, we think that Shirley showed a cause of action for the recovery of his interest in the bonds sued for originally, or their value proportionate to the amount or number of bonds paid for by his money used in the purchase by the defendant: was entitled to recover his portion of the bonds if to be found—by proceedings in partition, if practicable—or if the property is not subject to be recovered in kind, that he may recover the value of his said interest. The plaintiff, if entitled to sue, otherwise, may elect to proceed for the money as he has done in this proceeding under an amendment of his petition, made probably in consequence of the reversal of the former judgment and the reasons given therefor by the Supreme Court's opinion.

The funds of Shirley are traceable by the evidence into the bonds with unmistakable certainty. If the trustee invests the trust fund, or its proceeds, in other property, the *cestui que trust* may follow the fund into the new investment, so long as he can identify the purchase as made with the trust property, or its proceeds, although the

trustee may have taken the title in his own name, or in the name of any other person, with notice of the facts. 2 Perry on Trusts, secs. 835 and 836. See, also, 1 Perry on Trusts, 127, 128.

Story, in his treatise on Equity Jurisprudence, says: "It has been truly said that the only thing inquired of in a court of equity is, whether the property bound by a trust has come into the hands of persons who are either bound to execute the trust or to preserve the property for the persons entitled to it. If we advert to the cases on the subject, we shall find that trusts are enforced not only against those persons who are rightfully possessed of trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust. And whosoever so comes into possession is considered as bound with respect to that special property, to the execution of the trust. 1 Story Eq., sec. 533. See, also, 2 Story Eq. Jur., secs. 1257, 1258.

The general proposition, which is maintained both at law and in equity upon the subject is, that if any property, in its original state and form, is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right (not being *bona fide* purchasers for a valuable consideration without notice), any more valid claim in respect to it than they respectively had before such change. 2 Story Eq. Jur., sec. 1258. An abuse of a trust can confer no rights on the party abusing it, or on those who claim in privity with him. Ib. See also same authority, secs 1261c 1261d.

We conclude upon the whole case, that because it appears from the evidence that the plaintiff's action was barred by limitations, the judgment ought to be reversed; and, in view of the fact that it is not entirely apparent to us that justice would be best promoted by the Supreme Court rendering the judgment which ought to have been rendered below on the last trial, it is deemed more in consonance with the rights of the parties to remand the cause for further proceedings in order that both parties, having before them the opinion of the Supreme Court upon the various questions which have been discussed, may prepare their pleadings and try their cause under views here presented, not heretofore, perhaps, fully acted upon by the parties.

Therefore we report our conclusion to be, that the judgment ought to be reversed and the cause remanded.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY—CREDIT GIVEN TO AGENT.

If one knows that a purchase of goods for the plantation of a wife is made by her husband as her agent, and with this knowledge elects to give the exclusive credit to the agent, then the law is that he can not recover from the principal; but if he be ignorant of the fact that he is dealing with the agent of another, and that other got the goods and used them, and they were really bought for the principal, the seller may recover from the principal when this fact comes to his knowledge, though the credit was given to the agent. *Miller v. Watts*, S. C. Ga., March 27, 1883.

2. CONSTITUTIONAL LAW—REPUDIATION—OBLIGATION OF CONTRACTS.

In 1874 the legislature of Louisiana passed a consolidation revenue act, funding the indebtedness of the State and providing for the levying of a tax annually and continuously for the payment both of principal and interest, until the entire indebtedness should be paid off or extinguished, declaring the same to be a valid and subsisting contract between the State and its creditors, and providing also that certain State officers and a person selected by them, to be called a fiscal agent, should constitute a board of liquidation, authorized to issue bonds of the State to be called consolidation bonds, payable in forty years, with interest at seven per cent., and to exchange them for valid outstanding bonds and auditor's warrants at the rate of sixty cents on the dollar. The interest was to be payable semi-annually, and on the 1st of January and July of each year, and for it coupons were to be annexed to the bonds. Subsequently and during the same year an amendment to the State Constitution was adopted, declaring the said funding act of 1874 to be a valid and subsisting contract between the State and each and every holder of the consolidation bonds, which the State shall by no means and in no wise impair. In 1879 a new Constitution of the State was adopted, which took away the power of the executive officers to comply with the terms of the act of 1874. *Held*, that suits by creditors at large, of the class provided for in the act of 1874, can not be maintained to compel the officers of the State, by judicial procdss, to enforce the provisions of the act, when the State, by an amendment to its Constitution, has undertaken to prohibit them from doing so; that a suit to enjoin the diversion of moneys collected under the provisions of the act of 1874, appropriated to the general general purposes of the government, can not be brought in the State courts, and, under the eleventh amendment of the Constitution, no State can be sued in the courts of the United States by a citizen of another State. Neither was there when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the State courts or elsewhere, either by *mandamus* or injunction, against the State in its political capacity to compel it to do what it has agreed should be done, but which it refuses to do; and, there-

fore, such remedies do not exist against the executive officers of the State. *State v. Jumel; Elliott v. Wiltz*, U. S. S. C., March 5, 1883; 2 S. C. Rep.,128.

3. CO-TENANTS—VALUE OF IMPROVEMENTS MADE BY ONE CO-TENANT.
Where one tenant has made improvements upon a portion of the common property without the consent of his co-tenant, a court of equity, in making partition, will set apart to such tenant the portion so improved, if it can be equitably done. Freeman on Co-Tenancy, sec. 509. Where improvements are thus made which affect the whole property, compensation will not be made, unless the improvements were necessary or useful. Freeman on Co-Tenancy, sec. 510; 7 J. J. Marsh, 142. And where the land is indivisible, and the improvements so made are not found to have been necessary to the enjoyment of the estate, the value of them can not be allowed to the party making them, from the proceeds arising from a sale of the land in partition. 48 N. Y. 106. But the court may allow the tenant the amount which the property is enhanced in value at the time of the sale by the improvements. *Ellrod v. Keller*, S. C. Ind., March 31, 1883.

4. CRIMINAL LAW — "BEYOND A REASONABLE DOUBT"—CERTAINTY.
A charge that "mathematical certainty is not required in legal investigation—all that is required is moral certainty. Are your minds and consciences satisfied that the charge is true? If so, it is sufficient to authorize a conviction"—is not erroneous when taken in connection with the proper charge on the subject of reasonable doubts, which the court gave. *Heard v. State*, S. C. Ga., March 27, 1883.

5. ESTOPPEL—ELEMENTS OF.
The elements of estoppel are, a false representation or concealment of material facts, made with a knowledge of such facts; ignorance on the part of the person to whom the representations are made, or from whom the facts are concealed; intention that such person should act upon it, and action on his part induced thereby. *Blum v. Merchant*, S. C. Tex., Jan. 26, 1883; 1 Tex. L. Rev., 150.

6. EVIDENCE—WORDS AND PHRASES.
An inquiry can be made into the meaning of words used by persons in a particular business, such words having no fixed legal signification. *Kelly v. Robb*, S. C. Tex., January, 1883; 1 Tex. L. Rev., 153.

7. HOMESTEAD—ABANDONMENT IN PART—MORTGAGE.
1. When there is a fixed intention carried into execution to no longer use for the purposes of a home, nor as a place to exercise the calling or business of a head of a family, a portion of the property, and to appropriate the same to some purposes other than that contemplated by the Constitution, if the same is done in good faith, parties may be permitted to abandon a part of that which may have been homestead, as absolutely and clearly as they might abandon the whole property by ceasing to use and never intending again to use the property for the purposes for which the exemption is given. 2. A lien, however, given upon property which in fact is homestead at the time the lien is given, is invalid, although there may be an intention, even evidenced by a designation in writing, of less than is actually used at the time as the home, to make the homestead not to embrace the property upon which the lien is given. *Medlinka v. Downing*, S. C. Tex., Galveston Term, 1883; 1 Tex. L. Rep., 939.

8. INSURANCE, FIRE—ASSIGNMENT OF POLICY AS COLLATERAL—INCREASED RISK.
Where, by the terms of a policy of insurance, when the same has been transferred as collateral security to a mortgagee, and the transfer approved by the company issuing the policy, the insurance shall not be affected by any subsequent breach of the stipulations or conditions set out in the policy; but, in the event of a breach of any of the conditions, the insurance shall thenceforth stand in all respects as though originally effected upon such mortgage, notwithstanding the company is thereby made to assume a greater risk than was contemplated when the policy was issued. And where the company reserves the right of paying such mortgagee "such proportion of the sum insured as the damage by fire to the premises mortgaged or charged shall bear to their value immediately before the fire, but not exceeding such value." *Held*, that the company, having assented to the transfer of the policy to the mortgagees, voluntarily accepted the increased risk, and was liable to the mortgagees for any loss occurring upon the insured premises. *Held, further*, that the clause "the premises mortgaged or charged," embraced only the premises mortgaged which were insured. *Teutonia Fire Ins. Co. v. Mund*, S. C. Pa., Feb. 26, 1883; 40 Leg. Int., 142.

9. JURY TRIAL—MISCONDUCT OF JURY—WAIVER BY COUNSEL.
That the jury occupied the court room after they were charged by the court, and that one of them read to his fellows sections of the Code and commented thereon, is not a good ground for new trial in this case, as counsel for defendant consented and urged that the jury be allowed to remain in the court room, and when his attention was called to the fact that they would have access to books therein, insisted that he did not care if they did. *Durham v. State*, S. C. Ga., March 27, 1883.

10. LANDLORD AND TENANT—WATER FIXTURES—NEGLIGENCE OF TENANT.
When a water bowl is set by the landlord in a tenant's room for his exclusive use, with insufficient apertures for the outflow of the water if the faucet is left open, and this defect and the tenant's negligence in using the bowl, are together the cause of damage to another tenant, the landlord is not liable therefor. *McCarty v. York County Sav. Bk.*, S. C. Me., Feb. 2, 1883; 27 Alb. L. J. 266.

11. MASTER AND SERVANT—DEFECTIVE MACHINERY—NOTICE.
The master is not responsible for an injury to an employee which resulted from the use of defective machinery, of which the employee had full notice, as well as of the danger consequent upon its use, when the employee is directed to use it, and simply protests against the service, and yet performs it. *Galveston, etc. R. Co. v. Drew*, S. C. Tex., Galveston Term, 1883; 1 Tex. L. Rep. 925.

12. MECHANIC'S LIEN—PROMISSORY NOTE—WAIVER.
Where a promissory note is given and received in payment of a mechanic's claim for materials fur-

nished and work done under a contract with the owner, the lien of the mechanic is waived. *Crooks v. Finney*, S. C. Ohio, March 27, 1883; 3 Ohio L. J., 516.

13. MUNICIPAL CORPORATIONS — RURAL LANDS — CITY TAXES.

A municipal corporation has no power to charge rural lands with an assessment for water-pipe, calculated on their frontage, at a certain rate per foot. It is immaterial that the lands are enhanced in value by the laying of the water-pipe to the extent of the assessment. *Philadelphia v. Wetherill*, S. C. Pa., Jan. 22, 1883; 13 W. N. C., 10.

RECENT LEGAL LITERATURE.

THATCHER'S PRACTICE. A Digest of Statutes, Rules and Practice relative to the Jurisdiction and Practice of the Supreme Court of the United States. By Erastus Thatcher. Second Edition, with an Appendix of Practical Forms. Boston, 1883: Little, Brown & Co.

This work is based upon the statutory enactments of the United States establishing the court and limiting and defining its jurisdiction, and the decisions which have from time to time been rendered elucidating these, together with the rules which the court has, under the constitutional authority, from time to time instituted for the purpose of regulating procedure. The work of collecting and arranging these materials is carefully and thoroughly done, and the work can not fail to be valuable to that class of the profession whose labors are before the august tribunal of whose procedure it treats. The appendix of forms, which in many essential particulars are peculiar to that jurisdiction, will be found of much practical aid to those whose experience there is as yet limited.

STATUTE FORMS AND PRECEDENTS. Reprinted from the Authorized Editions of Federal, State, Territorial and District General Statutes, and Session Laws. Unaltered and Unabridged. Embracing the greatest Variety of Legal, Conveyancing, Commercial and Business Forms of a Practical and Standard Nature. By Hugh M. Spalding. New York, 1883: H. S. Mortimer.

This handy book of reference will be found to contain much matter from scattered sources that is nowhere else included in a single volume. That large and increasing class in the profession who do much business in other States than their own, through correspondents, will find it a great convenience.

NOTES.

——A singular coincidence was developed in the Detroit Probate Court. The will of Alvarina E. Jones was on hearing. One of the witnesses was an L. M. Gates, and Mr. L. M. Gates, of Kalamazoo County, had been summoned as a witness to testify to this signature. Mr. Gates went on the stand and swore that the handwriting resembled his so closely that he should admit it to be his own were it not for the fact that "Edmonston, Otsego County, New York," followed the signature in the same writing. He knew he had never written the name of that place, as he did not know there was any such place. At the request of Judge Durfee, witness wrote the same line, "L. M. Gates, Edmonston, Otsego County, N. Y.," and the handwriting appeared to be identical with that on the face of the will. Mr. Gates further testified that he had signed the will of testatrix's husband as a witness, but did not recall having signed Mrs. Jones' will. The HON. Charles S. May, of Kalamazoo, was called as a witness, and his evidence disclosed the coincidence. Mr. L. M. Gates, who witnessed Mrs. Jones' will, was a resident of Edmonston, N. Y., and a very different person from L. M. Gates of Kalamazoo. It seems the two are not relatives, and are in fact, total strangers to each other. The fact that their handwritings are so similar forms, in conjunction with their identity in name, one of the most remarkable coincidences ever disclosed in a court of law.

——As there seems to have been some fastidiousness about names at the Kilmainham Court House, it may be as well to point out that the position in which Mr. James Carey now figures is not technically that of an informer. An informer is a person who, generally for reward, accuses others and not himself. Mr. James Carey holds the much lower step in the ladder of baseness, in that he accuses his own confederates, impartially including himself in the charge. In times gone by he would have been called an approver, or prover—a person who, if he succeeded in convicting his accomplices, was entitled to his acquittal; but who, if his accomplices were acquitted, was immediately hanged. Nowadays he is properly called Queen's evidence, and is allowed to step from the dock into the witness-box in the hope that his life will be spared. It has happened before now that Queen's evidence at the trial refuse to repeat what they told to the magistrate, whereupon they may be put on their trial, and convicted on their own confession. Although the admission as witnesses of "approvers" who were entitled to an acquittal as of right has been abandoned for the use of Queen's evidence, who are only entitled to favor out of grace, it is still usual to give Queen's evidence a free pardon, on the analogy of the previous practice; but this will depend on the hopes which have been held out to them on behalf of the Crown.—*Law Journal.*